IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Matter of the Detention of	)	
	)	
JOHN CHARLES ANDERSON,	)	No. 79111-2
	)	
Petitioner.	)	En Banc
	)	
	)	Filed July 9, 2009

J.M. JOHNSON, J.—John Anderson is a convicted child rapist and, for the past decade, a mental patient institutionalized at Western State Hospital (WSH). At WSH he engaged in numerous sexual liaisons with vulnerable and developmentally disabled copatients. When he sought release, the State petitioned to commit him as a sexually violent predator under chapter 71.09 RCW.

The trial court appointed and funded an expert to assist in his defense, but Anderson ultimately decided not to call that expert at trial. Before trial, Anderson asked the court for the appointment of a different expert,

Dr. Richard Wollert, but the trial judge denied his request. At the conclusion of Anderson's trial, the trial court found that Anderson's sexual activities at the hospital were recent overt acts, found him to meet the sexually violent predator (SVP) definition, former RCW 71.09.020(16) (2006), *recodified as* RCW 71.09.020(18), and ordered his commitment. The Court of Appeals affirmed the holding of the trial court on a recent overt act but reversed and remanded for a new trial holding that the trial court erred in refusing to appoint the requested testifying expert for Anderson. *In re Det. of Anderson,* 134 Wn. App. 309, 139 P.3d 396 (2006).

Anderson now claims that the trial court erred in finding recent overt acts and in denying him another expert for trial. Anderson petitioned for discretionary review, and the State cross-petitioned, arguing the State's obligation is satisfied by providing the first expert. We granted review on both issues. *In re Det. of Anderson*, 160 Wn.2d 1005, 158 P.3d 614 (2007).

This court affirms the Court of Appeals' decision to remand for a new trial at which Anderson may call Dr. Wollert, or another expert witness, to perform an evaluation and testify at trial. Whether or not Anderson's conduct amounted to a recent overt act, according to former RCW 71.09.020(10)

(2006), *recodified as* RCW 71.09.020(12) will also be determined on remand but the acts as found do satisfy that requirement.

Facts and Procedural History

When John Anderson was 13, he lured a 5-year-old girl and exposed himself. At 15, he anally raped a 2-year-old boy and a boy 2 years his junior. When Anderson was 17, he pleaded guilty to statutory rape in the first degree of a 2 1/2-year-old boy. For this crime, Anderson was sentenced to a juvenile rehabilitation center. While serving his time at the juvenile center, he sexually abused his roommate. A year later, Anderson exposed himself to a female staff member and was convicted of public indecency.

Prior to Anderson's release, the State filed a petition to involuntarily commit him as an SVP.[1] Rather than contest the petition, Anderson admitted himself to WSH for treatment of sexual sadism and pedophilia.

While at WSH, Anderson had sexual relationships with eight patients, including four men.[2] The record indicates that Anderson intentionally took

[1] The Sexually Violent Predator Act defines SVP as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Former RCW 71.09.020(16).

[2] Anderson claims these relationships were consensual but that claim ignores the fact that most people adjudicated to be mentally ill are legally unable to consent. *See* RCW 9A.44.050(1)(b) and RCW 9A.44.100(1)(b) (punishing defendants who have sex with

advantage of his sexual partners. Three of Anderson's relationships were with mildly to moderate retarded patients, while Anderson's IQ (intelligence quotient) is between 128 and 130. A fourth patient had a childhood history of severe sexual abuse and a serious personality disorder. The trial court found that Anderson "engaged in sexual contact with at least four vulnerable patients . . . all of whom he knew to be developmentally delayed, psychiatrically impaired, or both." Clerk's Papers (CP) at 187.

Anderson himself described these relationships as "deviant," and he admitted that he took sexual advantage of at least two patients because they were disabled. 2 Verbatim Report of Proceedings at 120. Anderson's treatment professional at WSH testified that at least three of the patients with whom Anderson had sex were incapable of consensual sex. Anderson was repeatedly told by WSH staff to end these relationships, but he ignored this instruction.[3] Anderson engaged in the last of the reported sexual encounters

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people incapable of consenting because of mental incapacity); *see also State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994) ("[A] superficial understanding of the act of sexual intercourse does not by itself render [the mental incapacity law] inapplicable." A victim with mental incapacity fails to consent "where the jury finds the victim had a condition which prevented him or her from *meaningfully* understanding the nature or consequences of sexual intercourse.").

[3] Sexual relationships between patients are against WSH rules but are not uncommon. WSH makes condoms available.

just two months before the State filed this action.

After a decade in the hospital, Anderson sought to leave. The State and every expert who examined Anderson concluded that he was not safe to be at large, and the State petitioned to commit him as an SVP. While Anderson awaited trial, he was confined at the Special Commitment Center on McNeil Island.

Initially, the court appointed an expert for Anderson, Dr. Brian Judd, at state expense; however he ultimately decided not to use Dr. Judd at trial. Two years before trial, Anderson informed the State that he wished to consult with another expert, Dr. Richard Wollert. One week prior to trial, Anderson requested that the court appoint Dr. Wollert to testify on Anderson's behalf. Anderson agreed to waive his trial date to accommodate the State's need to interview Dr. Wollert prior to testimony. The State objected, and the trial court denied Anderson's request for appointment of this expert.

At trial, one of the State's experts, Dr. Amy Phenix, testified that Anderson's sexual relations with vulnerable copatients proved he was still dangerous because Anderson substituted vulnerable patients for his preferred child victims. Based on the expert testimony and documentary evidence, the

trial court found that Anderson is a sexual sadist, a pedophiliac, and has a personality disorder.[4] The trial court found that Anderson "is likely to engage in predatory acts of sexual violence if not confined in a secure facility." CP at 187. The court concluded as a matter of law that Anderson's sexual conduct toward vulnerable patients at WSH constituted a recent overt act, a prerequisite to Anderson's commitment.[5] *Id.* at 189. The trial court also held, after considering the experts, that Anderson was a sexually violent predator likely to engage in predatory acts if not confined. *Id.* Accordingly, the trial court ordered Anderson's commitment.

Anderson appealed, arguing that the State failed to prove a recent overt act. Anderson also claimed the trial court abused its discretion by denying his request for appointment of another expert for trial. The Court of Appeals suggested that the State had met its burden of proving a recent overt act, but it also held that the trial court had abused its discretion in denying Anderson's

[4] Because Anderson waived his right to a jury, the trial judge sat as the finder of fact.

[5] A recent overt act is "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." Former RCW 71.09.020(10). Although the State is not required to prove a recent overt act in every SVP commitment proceeding, it conceded that it had to in this case. *Anderson*, 134 Wn. App. at 323.

request for a new expert and remanded for a new trial. Both parties sought review.

Standard of Review

We review de novo whether Anderson's acts were recent and overt. *In re Det. of Marshall*, 156 Wn.2d 150, 158, 125 P.3d 111 (2005). We review a trial court's decision to admit expert testimony for abuse of discretion. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 57, 857 P.2d 989 (1993). Abuse of discretion occurs when the trial court acts on unreasonable or untenable grounds. *Indus. Indem. Co. of Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 926, 792 P.2d 520 (1990).

Analysis

I. Recent and Overt Act

Under the SVP law, to commit a nonincarcerated person, the State must prove a recent overt act, defined as any act or threat creating a reasonable apprehension of sexually violent harm in the mind of an objective person who knows the person's history and mental condition. Former RCW 71.09.030(5) (2008); former RCW 71.09.020(10). Anderson claims that his acts are neither recent nor overt. The State agrees it must establish this

element beyond a reasonable doubt. Because Anderson does not challenge the trial court's findings of fact in this regard, we treat those findings as true. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Note, however, that Anderson will receive a new trial, at which he may challenge all findings.

Anderson's sexual activities at WSH could constitute overt acts. Dr. Phenix testified, and the trial court found, that Anderson engaged in sexual activity with vulnerable patients as substitutes for his preferred victims, children.[6] As the Court of Appeals noted, Anderson's acts of exploiting vulnerable adults were closely akin to his assaults on children. Anderson also had ongoing sexual fantasies of children involving sexual violence. Dr. Phenix and other specialists who were familiar with Anderson's history and mental condition concluded in light of these factors that he posed a clear risk to reoffend if released from custody. Those expert opinions support a reasonable apprehension of sexually violent harm, and therefore by definition, Anderson's sexual activities could constitute overt acts. *See* former RCW 71.09.020(10).

[6] This court has previously decided that sex with a developmentally disabled person may have a nexus to child sex. In *Marshall*, 156 Wn.2d 150, we upheld a recent overt act finding where a man had been previously convicted of child molestation and his later overt act was the rape of an adult handicapped woman.

Anderson's overt acts were recent. This court has held in the SVP context that overt acts occurring up to five years before the petition's filing may be "recent." In *Marshall*, the defendant committed the act in November 1995, and the State brought the petition in November 2000. *Marshall*, 156 Wn.2d at 153. We held it to be a recent overt act. *Id.* at 159. In *In re Detention of Henrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000), one of the defendants committed his act in 1996, and the State filed the petition in 1999. *Id.* at 691. We held that this act was sufficiently recent. *Id.* at 696. Here, only two months before the State filed this petition, Anderson was reported having sex with a vulnerable copatient, the most recent *reported* act in a long string of such acts. The trial court correctly concluded that Anderson's acts two months before filing were recent, consistent with the law and prior decisions of this court.

II. It Was Abuse of Discretion To Fail To Appoint a Trial Expert

The trial court may appoint additional experts at State expense for good cause. *See* former WAC 388-885-010(3)(c) (1999), *recodified as* WAC 388-885-013(2). The Court of Appeals correctly determined that Anderson should have been permitted to engage an expert (Dr. Richard

Wollert) to perform a forensic psychosexual evaluation and to testify as an expert witness at trial. *Anderson*, 134 Wn. App. at 321-22. We agree with the Court of Appeals that Anderson's motion to call Dr. Wollert as an expert should be granted. A sufficient showing was made that Dr. Wollert would provide distinctly meaningful expert testimony in Anderson's defense. Dr. Wollert would have challenged Dr. Phenix's conclusion that Anderson is likely to commit predatory acts of sexual violence if not confined in a secure facility.[7] Anderson additionally cites Dr. Wollert's availability, the early notice that he was a possible expert witness, and difficulty in engaging another doctor as good cause for the appointment.

No significant countervailing interests undermined Anderson's request. As the Court of Appeals observed, any additional delay would not be in Anderson's best interest because he was confined. The State would not have been unduly prejudiced as a result of any delay. Dr. Wollert offered to be available to the State for discovery at any time. Anderson was also willing to waive his trial date to accommodate the State's need to interview Dr. Wollert

[7] The court did appoint Dr. Wollert to advise Anderson. However, as the Court of Appeals observed, this did not allow the trier of fact (the trial court itself in this case) to hear and consider testimony rebutting the State's evidence of Anderson's future dangerousness, a key element of the case.

prior to his testimony. Under these circumstances, we agree with the Court of Appeals that there was good cause to appoint Dr. Wollert as an additional expert witness at public expense under former WAC 388-885-010(3)(c).

We recognize that among the exceptional protections provided by the legislature for SVP trials,[8] multiple experts at state expense are not included. Thus, our holding should not be read as an open-ended entitlement for indigent SVP respondents to an unlimited number of experts at state expense. Under the specific circumstances of this case, however, the trial court acted on unreasonable grounds in denying the motion and, therefore, abused its discretion.

Conclusion

We remand for a new trial so that Dr. Wollert, or another appropriate expert witness, may perform an evaluation of Anderson and testify on his behalf. Whether or not Anderson's conduct amounted to a recent overt act, as with the other elements of the State's case, will have to be proved at that

[8] *See* former RCW 71.09.040 (2001) (judicial finding of probable cause, right to legal representation at the probable cause hearing, and evaluation only by a qualified professional); former RCW 71.09.050 (1995) (right to speedy trial, right to assistance of counsel at all stages of the proceeding, right to retain experts, and right to jury trial); former RCW 71.09.060 (2008) (proof must be beyond a reasonable doubt).

new trial.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Chief Justice Gerry L. Alexander
Justice Susan Owens
Justice Charles W. Johnson
Justice Barbara A. Madsen